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No. 95-1081

In The

Supreme Court of the United States

October Term, 1995

INGALLS SHIPBUILDING, INC. AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, IN LIQUIDATION, BY AND THROUGH THE MISSISSIPPI INSURANCE GUARANTY ASSOCIATION,

Petitioners,

versus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, AND MAGGIE YATES (Widow of Jefferson Yates),

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For the Fifth Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Does § 33(g) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, bar the compensation claim of a covered employee's wife when she, without the employer's approval, enters into wrongful death settlements with third parties before her husband's death for an amount less than the compensation benefits to which she would be entitled?

2. Does the Director of the Office of Workers' Compensation Programs, U. S. Department of Labor, have standing to respond in the U. S. Courts of Appeals in opposition to a private party with respect to a matter in which the Director has no interest?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER

TABLE OF AUTHORITIES – Continued

PETITIONERS' BRIEF ON THE MERITS

COME NOW, the Petitioners, Ingalls Shipbuilding, Inc.,[1] and American Mutual Liability Insurance Company, in liquidation, by and through the Mississippi Insurance Guaranty Association, and pray that the decision of the United States Court of Appeals for the Fifth Circuit entered on October 3, 1995, be reversed.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit, upon which certiorari has been granted, was entered on October 3, 1995, is reported at 65 F.3d 460, and is reprinted in the Appendix to the Petition for Writ of Certiorari (hereinafter Pet. Writ Cert. App.) at pp. 1-17. Petitioners' Suggestion for Rehearing *En Banc* was denied by the Fifth Circuit on November 22, 1995. (Pet. Writ Cert. App. 18-19). The decision of the Fifth Circuit affirms the decision of the Benefits Review Board in *Yates v. Ingalls Shipbuilding, Inc.*, 28 BRBS 137 (1994); (Pet. Writ Cert. App. 20-55). The decision of the Benefits Review Board affirmed in part and reversed in part the decision of the Administrative Law Judge in *Yates v. Ingalls Shipbuilding, Inc.*, 26 BRBS 174 (ALJ) (1992); (Pet. Writ Cert. App. 56-88).

[1] Ingalls Shipbuilding, Inc., is a subsidiary of Litton Industries, Inc.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 3, 1995. Jurisdiction of this Court to review the decision of the Court of Appeals for the Fifth Circuit is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves interpretations of the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. §§ 901, *et seq.* The specific statute of the LHWCA which is pertinent to this appeal involves 33 U.S.C. § 933, subsections (f) and (g), which are reprinted at Pet. Writ Cert. App. pp. 89-90.

STATEMENT OF THE CASE

Jefferson Yates was allegedly exposed to asbestos while employed with Ingalls Shipbuilding, Inc. from 1953 until 1967.[2] On March 23, 1981, he was diagnosed as having an asbestos-related disease. (RX-3, p. 1)[3]. On April

[2] The compensation carrier for Ingalls Shipbuilding, Inc. was American Mutual Liability Insurance Company, which is now in receivership. The obligations of American Mutual under the LHWCA have been assumed by The Mississippi Insurance Guaranty Association. Ingalls and American Mutual will hereafter be referred to jointly as "Ingalls."

[3] The following abbreviations are used throughout Petitioners' Brief when citing evidence of record: Joint exhibit - "JX", Ingalls' exhibit - "RX", Transcript of the hearing - "T".

16, 1981, he filed a compensation claim against Ingalls under the LHWCA. (RX-4)[4]. On May 26, 1981, he filed a third-party lawsuit in the United States District Court for the Southern District of Mississippi, Southern Division, seeking damages against 23 asbestos manufacturers for his asbestos-related disease. (RX-7).

Between May 1981 and January 1984, Mr. and Mrs. Yates, while being represented by the same attorneys who represented Mr. Yates in his LHWCA claim against Ingalls, entered into eight third party settlements with certain asbestos manufacturers. (RX-13; RX-23). They did so without the consent of Ingalls. (T-10; T-31; RX-20, pp. 7-12). Mr. and Mrs. Yates executed releases in conjunction with each of the third party settlements. (RX-13). In six of the eight settlements, Mrs. Yates released all claims for the potential wrongful death of her husband as an essential pre-condition of the settlements. (RX-13). For example, the settlement with Garlock, Inc. on May 20, 1982, states:

> [A]nd the undersigned do hereby agree that *any claims, demands, actions, or causes of actions* that *they or either of them may now have or hereafter have* against Garlock, Inc. are wholly and forever satisfied and extinguished, whether the full extent of exposure of the undersigned *Jefferson T. Yates or Maggie Yates* to any product manufactured, sold or distributed by Garlock, Inc., if

[4] Several thousand claimants have filed similar asbestos compensation claims against Ingalls under the LHWCA. *See Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130 (5th Cir. 1994).

any, or the extent of the harm or damages caused thereby is now fully known or not.

(RX-13, p. 8) (emphasis added).

The release dated January 30, 1984 with GAF Corporation states:

> For and in consideration of the sum of Six Thousand And No/Hundred ($6,000.00) Dollars, cash in hand paid, the undersigned, J. T. Yates, for and on behalf of himself individually and on behalf of his heirs, administrators, executors, personal representatives and assignees *joined herein by his wife*, does hereby release and forever discharge GAF Corporation ("GAF"), its officers, agents, employees, successors, predecessors, including the Ruberoid Company ("Ruberoid"), insurers and re-insurers, from *any and all claims*, causes or rights of actions, demands and damages *of every kind or nature*, including all present and/or *future claims by the undersigned spouse* and/or other heirs of J.T. Yates for loss of consortium, services, and/or *wrongful death of J. T. Yates*.

(RX-13, p. 20) (emphasis added).

The release dated January 30, 1984 with Owens-Illinois states:

> For and in consideration of the sum of Three Thousand and No/100 ($3,000.00) Dollars, plus accrued interest, cash in hand paid, the undersigned, Jefferson Yates, acting for and on behalf of himself individually and on behalf of his heirs, administrators, executors, personal representatives, and assigns, joined herein by his wife, Maggie Yates, does hereby release and forever discharge Owens-Illinois Glass Company

> and Owens-Illinois, Inc. ("Owens-Illinois"), its officers, agents, employees, predecessors, insurers, and reinsurers, from any and all claims, causes or rights of action, demands and damages of every kind or nature, including all present and/or future claims by the undersigned spouse, and/or other heirs of Jefferson Yates for loss of consortium, services, and/or *wrongful death* of Jefferson Yates which the undersigned may now or hereafter have.

(RX-13, p. 34) (emphasis added).

Mr. Yates died of prostate cancer on January 28, 1986. The parties stipulated that his exposure to asbestos contributed to his death. (JX-1; RX-15; RX-16). On April 22, 1986, Mrs. Yates, respondent herein, filed a compensation claim for death benefits against Ingalls under § 9 of the LHWCA. 33 U.S.C. § 909 (1986); (RX-17).

Ingalls controverted the LHWCA claim of Mrs. Yates because, among other reasons, she failed to obtain the approval of Ingalls as required by § 33(g)(1) to the third party settlements into which she and her husband entered before his death. (JX-1).

On April 23, 1992, the Administrative Law Judge held that the LHWCA claim of Mrs. Yates was not barred by her unapproved third party settlements finding that she was not a "person entitled to compensation" and therefore not bound by the employer approval requirements of § 33(g)(1) because her husband was alive at the time of such settlements. (*See* Pet. Writ Cert. App. at pp. 56-88). On June 29, 1994, the Benefits Review Board affirmed the Administrative Law Judge's holding that

Mrs. Yates' claim was not barred by § 33(g)(1). (*See* Pet. Writ Cert. App. at pp. 20-55).

Pursuant to 33 U.S.C. § 921(c), Ingalls appealed the Benefits Review Board's decision to the U.S. Court of Appeals for the Fifth Circuit. During the proceedings before the Fifth Circuit, the Director of the Office of Workers' Compensation Programs, U.S. Department of Labor ("Director"), responded in opposition to Ingalls even though the Director had no statutory or financial interest in the case. Because of his lack of standing, Ingalls objected to the involvement of the Director in the appeal.

On October 3, 1995, the Fifth Circuit affirmed the Benefits Review Board. (*See* Pet. Writ Cert. App. at pp. 1-17). In its decision, a panel of the Fifth Circuit, citing this Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992) (*see* Pet. Writ Cert. App. pp. 101-142), held that the LHWCA claim of Mrs. Yates did not vest until the death of Mr. Yates because she was not a "person entitled to compensation" within the meaning of § 33(g) at the time of the unapproved pre-death settlements. (*See* Pet. Writ Cert. App. at pp. 10-11). The panel also held that the Director had standing to involve himself in this appeal citing *Ingalls Shipbuilding Div. v. White*, 681 F.2d 275 (5th Cir. 1982) (*see* Pet. Writ Cert. App. at pp. 143-180), *rev'd on other grounds, Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir.), *cert. denied*, 469 U.S. 818 (1984), notwithstanding the recent decision of this Court in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 115 S.Ct. 1278 (1995) (*see* Pet. Writ Cert. at pp. 198-224), which held that the Director had no

standing to appeal a claim in which he had no cognizable interest. (Pet. Writ Cert. App. p. 6).

Certiorari has been granted to review the decision of the U.S. Court of Appeals for the Fifth Circuit with respect to the proper application of § 933(g) of the LHWCA and the Director's standing to involve himself in this appeal as a respondent and as an active party opponent.

SUMMARY OF THE ARGUMENT

I. A WIFE WHO SETTLES HER CLAIMS FOR THE WRONGFUL DEATH OF HER HUSBAND WITHOUT THE CONSENT OF HIS EMPLOYER IS BARRED BY SECTION 33(g)(1) OF THE LHWCA FROM RECEIVING COMPENSATION BENEFITS FROM THE EMPLOYER REGARDLESS OF WHETHER THE UNAPPROVED SETTLEMENTS OCCURRED BEFORE OR AFTER THE HUSBAND'S DEATH.

A potential widow who settles her wrongful death claims before the death of her husband must obtain the consent of her husband's employer under the approval requirements of § 33(g). Absent consent and pursuant to § 33(g)(1), her compensation claim against the employer will be barred. This interpretation is consistent with the plain language of § 33(g)(1) which makes it applicable to persons who "would be entitled to compensation" under the LHWCA. This interpretation is also consistent with the underlying purpose of § 33(g) which is to protect the employer when a worker or those claiming through him

settle third party tort claims for less than the compensation to which he or they would be entitled under the LHWCA. This interpretation is also consistent with the decision of the U.S. Court of Appeals for the Ninth Circuit in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 846 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994), which determined that "a claimant's status as a 'person entitled to compensation' need not be fixed at any particular moment." This is further consistent with the purpose of § 33(g)(1) which is to protect the employer against workers entering into inordinately low settlements which would increase the employer's compensation liability to the worker. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 482-483 (1992).

The Fifth Circuit's application of the "vesting" language found in *Cowart*, so as to allow Mrs. Yates to enter into unapproved pre-death third party settlements for less than the compensation to which she would be entitled while preserving her unencumbered ability to obtain additional compensation benefits from Ingalls, is inconsistent with the plain language of § 33(f) and (g). Instead of finding that her LHWCA compensation claim is derivative of her husband's injury, and instead of following the natural reading of § 33(g) which requires anyone who "would be entitled" to compensation to secure employer approval of the settlements, the Fifth Circuit held that Mrs. Yates was not bound by § 33(g)(1) because her husband was alive at the time of such settlements. The prejudicial effect on Ingalls, however, is the same whether her unapproved settlements were before or after his death. Such a narrow interpretation of § 33(g)(1) has opened the door to limitless opportunities for relatives of workers with occupational diseases to negotiate third

party settlements before the worker's death for less than they would be entitled under the LHWCA and then later hold the employer responsible for the difference, no matter how improvident the settlements were, and no matter how little was paid in settlement.

Further, the narrow interpretation by the Fifth Circuit of the phrase "person entitled to compensation" in § 33(g)(1) if consistently applied to the same phrase in § 33(f) would also defeat the right of an employer to a statutory credit or setoff against its compensation liability to the extent of the net third party recoveries received by the worker or those claiming through him. In effect, such a "consistent interpretation" would render such settlements totally useless and of no account to employers. To allow the decision of the Fifth Circuit to stand under these circumstances would either engraft an exception into § 33(f) and (g) never contemplated by the statute with regard to possible improvident settlements, and/or would totally thwart the *quid pro quo* given to employers under § 33 in exchange for their strict liability to pay compensation irrespective of fault. 33 U.S.C. § 904(b) (1986).

II. THE DIRECTOR OF THE OFFICE OF WORKERS' COMPENSATION PROGRAMS DOES NOT HAVE STANDING TO RESPOND IN THE COURTS OF APPEALS IN OPPOSITION TO A PRIVATE PARTY WITH RESPECT TO A RULING IN WHICH HE HAS NO INTEREST.

The Director of the Office of Workers' Compensation Programs does not have standing to respond in opposition to an employer's appeal with respect to a ruling in

which he has no interest. Both the framework and the history of the LHWCA evidence a statutory intent to remove the Director from any litigative posture. Under the 1972 amendments to the LHWCA, the Director is limited to an impartial administrative role to encourage the informal resolution of conflicts between employers and employees. The LHWCA does not allow the Director to appeal a case to the U. S. Courts of Appeals unless the Director is adversely affected or aggrieved. Since the U. S. Constitution's Article III standing requirements are the same for any party litigant, the Director must be able to show that he would be adversely affected or aggrieved by the case in order to participate as a respondent before the courts of appeals. In accord with a long line of case law from the Fourth Circuit, the Director is not to be accorded automatic standing to participate in LHWCA cases before the courts of appeals which involve private disputes between an employee and an employer.

The Fifth Circuit has held in the present case that the Director had standing under Rule 15(a) of the Federal Rules of Appellate Procedure to respond to all appeals under the LHWCA. Although Rule 15(a) does state that in the review of orders of an administrative agency the agency be named respondent, the D.C. Circuit and Fourth Circuit have held that the general applicability of Rule 15(a) is not appropriate in LHWCA claims because the involvement of the Director is not necessary to insure the proper adversarial clash necessary to a "case or controversy." Moreover, the terms of the LHWCA require that the Director be adversely affected or aggrieved, the same as any other party, before it may participate in review before the courts of appeals.

The LHWCA is devoid of any role for the Director in cases before the courts of appeals absent some direct interest. If the Director were to have a role, the statute easily could have so provided. Although certain regulations of the Director are subject to differing interpretations, they may not be interpreted to exceed the authority granted by the LHWCA. Moreover, even if Rule 15(a) requires that the Director be named as a nominal respondent, it is a procedural rule only and should not confer standing to nor give the Director the automatic right to take sides in a private dispute between an employee and employer who are both represented by counsel.

ARGUMENT

I. A WIFE WHO SETTLES HER CLAIMS FOR THE WRONGFUL DEATH OF HER HUSBAND WITHOUT THE CONSENT OF HIS EMPLOYER IS BARRED BY SECTION 33(g)(1) OF THE LHWCA FROM RECEIVING COMPENSATION BENEFITS FROM THE EMPLOYER REGARDLESS OF WHETHER THE UNAPPROVED SETTLEMENTS OCCURRED BEFORE OR AFTER THE HUSBAND'S DEATH.

The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, is a workers' compensation scheme enacted in 1927 and is applicable to shipyard workers such as the late Jefferson Yates. 33 U.S.C. §§ 902(3), 903(1) (1986). The LHWCA, like all workers' compensation schemes, reflects a compromise between the rights of employees and employers. The employees give up unlimited damages at common law for

prompt payment of statutory benefits. *Peters v. North River Ins. Co.*, 764 F.2d 306, 310 (5th Cir. 1985); *Louviere v. Shell Oil Co.*, 509 F.2d 278, 283 (5th Cir. 1975), *cert. denied*, 423 U.S. 1078 (1976). To recover benefits, the injured worker need not show that the employer was at fault in causing the injury. 33 U.S.C. § 904(b) (1986). Instead, the employee need only show that his injury arose out of and in the course of employment. 33 U.S.C. § 902(2) (1986). Where an injured worker establishes that he has suffered a compensable injury, he may be entitled to compensation and/or medical benefits under the LHWCA. 33 U.S.C. §§ 907, 908 (1986). If the worker's injury results in his death, the worker's spouse and dependents are likewise entitled to compensation under the LHWCA. 33 U.S.C. § 909 (1986).

Section 33 of the LHWCA allows either the employee or the employer to seek recoveries against a responsible third party. 33 U.S.C. § 933(b) (1986). Its purpose is to (1) place the burden ultimately on the person or entity whose fault caused the injury; and (2) to protect employers who are liable to its employees under the LHWCA regardless of fault. *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 412 (1953); *see Peters*, 764 F.2d at 310. Where the employee recovers on a third party claim, his employer is entitled to reimbursement from the net third party recovery (gross recovery less attorney fees and expenses) for all benefits paid under the LHWCA. At the same time the employer's LHWCA subrogation rights against the tortfeasor are extinguished. 33 U.S.C. § 933(f) (1986); *see Peters*, 764 F.2d at 317-321.

To protect an employer "against his employee accepting too little for his cause of action against a third party" and thereby subjecting the employer to excessive compensation liability to the employee, the LHWCA also includes a forfeiture provision at § 33(g) of the LHWCA. *Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459, 467 (1968); *Robinson Terminal Warehouse Corp. v. Adler*, 440 F.2d 1060, 1062 (4th Cir. 1971). Section 33(g)(1) provides that where the "person entitled to compensation" settles with a third person without the approval of the employer or carrier for less than he would be entitled under the LHWCA, then any claim he may have for further compensation and medical benefits is barred. In 1984, § 33(g)(1) of the LHWCA was amended to provide that forfeiture occurs "regardless of whether the employer or employer's insurer has made payments or acknowledged entitlement to benefits under this chapter."[5]

Mr. Yates developed an asbestos-related disease during his employment. He filed a claim for compensation against Ingalls under the LHWCA. He also filed a products liability action against many asbestos manufacturers claiming that he was exposed to and injured by their products while working for Ingalls.

Mr. and Mrs. Yates subsequently entered into eight third party settlements without the consent of Ingalls. In six of them, Mrs. Yates released all claims she had for the

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[5] The amended version of § 33(g) applies to this case, which was pending on or after the date of enactment of the 1984 amendments. *See* § 28(a) of the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-428, 98 Stat. 1639, 1655 (1984).

potential wrongful death of her husband for amounts which were less than the compensation to which she would be entitled from Ingalls. By entering into these unapproved third party settlements, Mrs. Yates exposed Ingalls to compensation liability to her and, at the same time, extinguished Ingalls' LHWCA subrogation rights against the asbestos manufacturers. *See, e.g., Peters*, 764 F.2d at 312. Notwithstanding the prejudicial effect of these unapproved settlements on Ingalls, the Fifth Circuit held that Mrs. Yates was not a "person entitled to compensation" under § 33(g) because her husband was alive when she entered into the settlements, and therefore, she was not obligated to comply with the employer approval requirements of § 33(g)(1) with respect to those settlements. (Pet. Writ Cert. App. 10-11).

The Fifth Circuit erred in finding § 33(g)(1) inapplicable to a wife who settles her wrongful death claims before the death of her husband. The prejudicial effect on her husband's employer is the same regardless of whether the settlements occur before or after the husband's death. Further, such a decision in effect confers greater protection under the law to a potential widow than to an actual widow or to her husband, the injured worker, from whom all benefits are ultimately derived.[6] In this regard, the Fifth Circuit's decision neither considered the underlying purpose nor the plain language of § 33(g)(1).

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[6] Had Mrs. Yates been a widow receiving compensation from Ingalls at the time she settled with third parties without Ingalls' consent, or had her husband done the same during his lifetime (which he did), his right to receive future compensation would clearly be barred. *See Cowart*, 505 U.S. at 471 & 475 (1992).

The beginning point here must be § 33(g)(1) itself. When a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extracrdinary of circumstances, is finished. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) (citing *Demarest v. Manspeaker*, 498 U.S. 189, 190 (1991)); *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984); *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 275 (1980).

Section 33(g)(1) provides as follows:

> If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) *would be* entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

33 U.S.C. § 933(g) (1986) (emphasis added); (Pet. Writ Cert. App. pp. 89-90).

By making itself applicable to what a person or person's representative "would be" entitled under the LHWCA, § 33(g)(1), the statutory scheme encompasses a broad forward looking concept which equally would apply to a person who would be entitled to compensation

in the future. Applying a forward looking interpretation to the LHWCA is not a novel idea. In *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981), the Fifth Circuit held that § 8(h) of the LHWCA regarding assignment of disability requires a "forward-looking" perspective. *Id.* at 772. Similarly, the LHWCA, in a forward-looking approach, allows posthumous children to recover death benefits. 33 U.S.C. § 902(14) (1986). Likewise, awards of death benefits and permanent total disability benefits are subject to future inflationary adjustments. 33 U.S.C. § 906(b)(1) (1986).

The "would be" language of § 33(g)(1) has been relied upon by the Benefits Review Board when considering whether a settlement is for more than or less than the benefits to which an injured worker would be entitled under the LHWCA. *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994). Specifically, in *Linton*, the Board held that one should look not only to an injured worker's present entitlement but to his future entitlement to determine whether the third party recovery is for more than the employer's liability under the LHWCA. *Id.*

A prospective construction of § 33(f) and (g) was given by the Ninth Circuit in a case identical to the case at bar. *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994); (Pet. Writ Cert. App. 91-100). In *Cretan*, an injured shipyard worker and his wife entered into third party settlements before his asbestos-related death. *Cretan*, 1 F.3d at 845. Those settlements, like the settlements in the present case, included the potential wrongful death claims of Mrs. Cretan. *Id.* Like Mr. and Mrs. Yates in the present case, Mr. and Mrs. Cretan did not obtain the employer's written consent to

the settlements. *Id.* The Ninth Circuit held that the LHWCA claim of Mrs. Cretan, which she filed following the death of her husband, was barred by the plain language of § 33(g)(1) due to her unapproved pre-death settlements. *Id.* at 848. In so concluding, the Ninth Circuit re-adopted its earlier view that "a claimant's status as a 'person entitled to compensation' need not be fixed at any particular moment." *Id.* at 846 (citing *Force v. Director, OWCP*, 938 F.2d 981, 984-985 (9th Cir. 1991)). Indeed, the Ninth Circuit concluded that, in determining the applicability of § 33(g)(1), there was "little sense in a distinction that turns on whether the death for which settlement is made has yet to occur" because the prejudicial effect on the employer is the same. *Cretan*, 1 F.3d at 847.

In ascertaining the plain meaning of the statute, the court must look not only to the particular statutory language, but also to the "design of the statute as a whole and to its object and policy". *Crandon v. United States*, 494 U.S. 152, 158 (1990); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *County of Seneca v. Cheney*, 806 F. Supp. 387, 404 (W.D.N.Y. 1992). The language of § 33(f) and (g) are designed to form a comprehensive scheme to protect an employer from payment of increased compensation to a worker who accepts too little for his third party claims. *Banks v. Chicago Grain Trimmers*, 390 U.S. 459, 467 (1968); *I.T.O. Corp. v. Selman*, 954 F.2d 239, 242 (4th Cir. 1992). Clearly, the underlying purpose of § 33(g) would be eliminated by allowing a wife to enter into unapproved settlements of her wrongful death claims for less than she would be entitled under the LHWCA and then allow her

to recover LHWCA benefits against the employer following her husband's death as if she had never settled these claims.

In *Cretan*, the Ninth Circuit noted that if it adopted such a view, "third party tortfeasors could benefit from offering to desperate families inordinately small [pre-death] settlements the deficiencies of which the employer would have to make up [following the worker's death]." *Cretan*, 1 F.3d at 848. Put another way, such a view would allow relatives of claimants who are destined to die from an occupational disease the opportunity to negotiate pre-death settlements, benefit from a double recovery against the employer under the LHWCA and, at the same time, defeat the employer's rights of offset under § 33(f) because they were not "persons entitled to compensation" at the time of the unapproved settlements. Such results make no sense when the purpose and structure of § 33(f) and (g) are considered. *See Cowart*, 505 U.S. at 482.

The Fifth Circuit apparently felt compelled to find as it did because of the "vesting" language in *Cowart*. This Court found in *Cowart* that an employee became a person entitled to compensation at the time of his injury rather than when an employer admits liability. *Cowart*, 505 U.S. at 477. In so finding, this Court noted that Cowart became a person entitled to compensation "at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen." *Id.*; (Pet. Writ Cert. App. p. 109). Seizing upon this language, the Fifth Circuit concluded that Mrs. Yates was not bound by the employer approval requirements of § 33(g)(1) because at the time of the pre-death settlements, her claim for LHWCA death benefits against Ingalls had not vested.

Cowart did not deal with whether a wife can enter into unapproved wrongful death settlements and then seek LHWCA compensation benefits once her husband dies. In finding that *Cowart* did not control this issue, the Ninth Circuit stated in *Cretan v. Bethlehem Steel Corp.*, as follows:

> It is clear that the holding of *Cowart* does not dictate the outcome of our case. It does not rule on the question whether a claimant whose entitlement will mature upon a death that has not yet occurred is a "person entitled to compensation." *Cowart* does, however, contain language that in isolation appears to support the Cretans. In rejecting the view that Cowart did not become "entitled" until he obtained an order or a payment, the Court stated: "He became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen." *Id.* at ___, 112 S.Ct. at 2595. The Court also stated that the normal meaning of entitlement is that "the person satisfies the prerequisites attached to the right." *Id.* The Cretans seize upon this language, and argue that their entitlement to compensation under the Act vested when John died. There is no reason, however, to assume that the Supreme Court had the present situation in mind when it uttered these dicta. The Court's point was that an entitlement did not have to be reduced to order or payment to be an entitlement. The Cretans give the vesting language a reading which is separated from the facts to which it is addressed. We decline to give the Supreme Court's statement a binding effect that there is no reason to believe the Court intended. *See United States v. Ordonez*, 737 F.2d

793, 803 n.1 (9th Cir. 1984) (discussing uses of dictum).

Cretan, 1 F.3d at 847.

In *Cowart*, this Court found that the natural reading of § 33(g) supported the conclusion that a "person entitled to compensation" within the meaning of § 33(g)(1) need not at the time of the unapproved settlements be receiving compensation or have had an adjudication in the person's favor. *Cowart*, 505 U.S. at 477. This is entirely consistent with the position of Ingalls that the natural reading of § 33(f) and (g) support the conclusion that a "person entitled to compensation" is not only one who is receiving compensation but is also one who "would be" entitled to receive compensation in the future. To view § 33(f) and (g) any other way would allow a wife to settle her wrongful death claims the day before her husband's death and still be entitled to LHWCA death benefits without offset while another wife who settles the day after her husband's death is completely barred from such benefits by § 33(g)(1). Certainly, such an illogical result surely strains the intent of the statute.

In addition, since a widow's claim for compensation benefits is derivative of the initial injury, the vesting language in *Cowart* is entirely compatible with the LHWCA interplay between a lifetime disability claim and a post-death survivor's claim arising out of the same injury. In this regard, the Fourth Circuit has noted as follows:

> The Act does provide, as the carrier urges, for two separate rights and types of recovery, the beneficiaries of which are different. One

> embraces the compensation payable to the disabled employee by way of disability benefits; the other represents death benefits payable to certain statutorily designated beneficiaries. *But both types of recovery derive their basis from the same event, i.e., the employee's injury. It is that event which gives both a right to compensation under Section 908 and a right to death benefits under Section 909.* Neither right of action, whether for compensation payments or for death benefits, exists apart from the critical fact of injury; each is dependent for its basis on the injury. *It is inaccurate, therefore, to state that the right to death benefits has its origin solely in the event of death; the real source of liability for such payments under the Act traces back to the injury itself.*

Pennsylvania Nat'l Mut. Casualty Ins. Co. v. Spence, 591 F.2d 985, 987 (4th Cir.), *cert. denied*, 444 U.S. 963 (1979) (emphasis added); *see also Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 899, 901 (9th Cir. 1979).

The critical aspects of a potential death claim vest at the time of the worker's injury. The LHWCA provides that "[a]ll questions of dependency shall be determined as of the time of the injury." 33 U.S.C. § 909(f) (1986). Since Mrs. Yates' status as a dependent widow was established as of the time of her husband's injury, her § 33(g) approval obligations were also established at the time of his injury.

Many other aspects of a death claim also vest at the time of the worker's injury. For example, the responsible insurance carrier is determined at the time of injury as opposed to the time of death. *Travelers Ins. Co. v. Marshall*,

634 F.2d 843, 847 (5th Cir. 1981). The jurisdictional requirement of situs for a death claim is determined at the time of injury. 33 U.S.C. § 903(a) (1986). The jurisdictional requirement for status in a death claim is likewise determined based upon a worker's status at the time of injury. 33 U.S.C. § 902(3) (1986). The responsible employer in an occupational disease claim is the last employer where the worker was exposed to injurious stimuli before his death. *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 144 (2nd Cir.), *cert. denied*, 350 U.S. 913 (1955). The average weekly wage which is used as a basis for paying a widow compensation is based upon the decedent's average weekly wage at the time of injury. 33 U.S.C. § 910 (1986).

Despite the fact that critical aspects of a death claim vest at the time of injury, the Fifth Circuit in *Cowart* found that Mrs. Yates was free to ignore § 33(g) because Mr. Yates was alive when she settled her third party potential wrongful death claims. Such a finding creates a patent asymmetry in the law. How can a potential widow enter into enforceable settlements of her potential wrongful death claim to the prejudice of the employer and at the same time not have a concomitant obligation to abide by the approval requirements of § 33(g)(1)? To the extent entitlement existed, Mrs. Yates was just as entitled to receive compensation under the LHWCA as she was entitled to recover for her husband's wrongful death when she entered into the unapproved settlements during his lifetime. By obtaining the functional equivalent of LHWCA benefits through the third party settlements in return for settling her future wrongful death claims, Mrs. Yates gained the benefits her status as a potential widow

conferred. By occupying the status of a widow in order to settle and be paid for her future wrongful death claims, and because she became vested with the LHWCA's protections and benefits once her husband was injured at work, she was a "person entitled to compensation" who settled with third parties for an amount less than the compensation to which she "would be entitled" under § 33(g)(1). Accordingly, she should not be permitted to avoid her § 33(g)(1) employer approval responsibilities and obtain greater benefits and protections than that afforded to covered employees who settle their third party claims, and to widows who settle post- death third party claims. *See generally Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992).[7]

Moreover, the Fifth Circuit's narrow interpretation of the phrase "person entitled to compensation" in § 33(g), if equally applied to the same phrase in § 33(f), would preclude the right of Ingalls to a statutory offset or credit with respect to the net amounts recovered by Mrs. Yates from the third party settlements. Section 33(f) provides in pertinent part as follows:

> If the *person entitled to compensation* institutes proceedings . . . the employer shall be required

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[7] In reaching their decision that the widow's claim was not vested prior to decedent's death, the Fifth Circuit noted that certain contingencies could have prevented Mrs. Yates from ever being entitled to LHWCA benefits. For example, the Court noted that Mrs. Yates could have predeceased or divorced her husband, or Mr. Yates could have died from unrelated causes. (Pet. Writ Cert. App. 10-11). However, those same contingencies would have likewise prevented Mrs. Yates from ever recovering tort damages for the wrongful death of her husband.

> to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person.

33 U.S.C. § 933(f) (1986) (emphasis added).

It is a basic canon of statutory construction that identical terms within an act bear the same meaning. *Cowart*, 505 U.S. at 479; *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986). In *Cowart*, this Court rejected a narrow interpretation of "person entitled to compensation" in § 33(g) in large part because it made no sense when applied to § 33(f). *Cowart*, 505 U.S. at 478-479. In that regard, this Court in *Cowart* stated as follows:

> Another difficulty would be presented for the provision preceding § 33(g), § 33(f). It mandates that an employer's liability be reduced by the net amount a person entitled to compensation recovers from a third party. Under Cowart's reading, the reduction would not be available to employers who had not yet begun payment at the time of the third party recovery. That result makes no sense under the LHWCA structure. Indeed, when a litigant before the BRB made this argument, the Board rejected it, acknowledging in so doing that it had adopted differing interpretations of the identical language in sections 33(f) and 33(g). *Force v. Kaiser Aluminum and Chemical Corp.*, 23 BRBS 1, 4-5 (1989). This result is contrary to the basic canon of statutory construction that identical terms within an Act bear the same meaning. *Sullivan v. Stroop*, 496 US 478, 484, 110 L Ed 2d 438, 110 S Ct 2499 (1990); *Sorenson v. Secretary of Treasury*, 475 US 851, 860, 89 L Ed 2d 855, 106 S Ct 1600 (1986). The Board's willingness to adopt such a forced and unconventional approach does not convince us we should do the same. And we owe no deference to the BRB.

Cowart, 505 U.S. at 479.

Likewise, in *Cretan*, the Ninth Circuit observed that the same interpretation given to the phrase "person entitled to compensation" in § 33(g) would have to be given to the same phrase in § 33(f). *Cretan*, 1 F.3d at 848. The *Cretan* court correctly found that a narrow interpretation of the phrase "person entitled to compensation" would defeat not only the purpose of § 33(g) but also the purpose of § 33(f), which is to protect employers against double recovery when a worker or those claiming through him enter into unapproved third party settlements. *Id.* at 847.

In construing the phrase "person entitled to compensation" in § 33(f), the Ninth Circuit held in *Force v. Director, OWCP*, 938 F.2d 981 (9th Cir. 1991), as follows:

> We reject Mrs. Force's argument that section 933(f) does not provide for any offset against her death benefits. She contends that section 933(f) does not apply to her because she was not a "person entitled to compensation" at the time she entered into the settlement, which was prior to her husband's death. Again, we defer to the Director's view that section 933(f) does not require the claimant's status as a "person entitled to compensation" to be determined at any particular time; "[t]he only relevant question is

> whether the claimant is impermissibly recovering twice for the same injury, regardless of when such payments occur." Director's Brief at 26. If Mrs. Force had successfully sued for wrongful death after her husband's death, Kaiser clearly would be entitled to offset the damages recovered against its death benefits liability. Instead, she settled her *potential* wrongful death claims prior to Mr. Force's death. Section 933(f) is equally applicable and allows the employer to offset the third party recovery.

Force, 938 F.2d at 984-985.

To find, as the Fifth Circuit did, that persons "entitled to compensation" are only those "vested" with rights to currently receive biweekly compensation benefits would be to misread § 33(f) and (g), and to ignore the purpose for adding these sections in the LHWCA, and would in effect create an unlimited potential for manipulation of the compensation system to the detriment of all LHWCA employers. For example, if an employee is injured at work but does not initially miss work due to the injury, he may not be entitled to *receive* compensation. It could hardly be argued, however, that if that employee pursues a third party action for tort benefits due to the injury, he is not "a person *entitled* to compensation" under § 33(g). 33 U.S.C. § 933(g) (1986) (emphasis added). The employee's entitlement to compensation, per *Cowart*, accrues when he was injured, regardless of whether the employer has paid or recognized the employee's entitlement to compensation. Likewise, where an employee is injured at work in such a way that the injury may lead to the employee's death, the fact that the spouse of the employee is not yet receiving compensation while the

employee is alive does not mean that she loses her status as a "person *entitled* to compensation." 33 U.S.C. § 933(g) (1986) (emphasis added). Surely, such a spouse seeking compensation benefits under the LHWCA should not be granted any greater rights under § 33(g) than the injured and deceased employee would have had, had he lived and consummated unapproved third party settlements. Under the narrow interpretation of a "person entitled to compensation" given by the Fifth Circuit, the employer would have absolutely no rights under § 33(f) and (g) with respect to such settlements. Such an illogical interpretation is a matter of great potential consequence.

The better view, and the one which comports with LHWCA's intent, and is logical and that avoids absurd results, is that a person's rights under the LHWCA to all forms of compensation benefits, including biweekly compensation payments and medical benefits, and the rights under the LHWCA to those who claim through the injured employee, are vested in such persons when a covered job-related injury occurs. It is the occurrence of this injury, whether disabling or not, which initiates coverage under and vesting in the rights and benefits the LHWCA confers. Though the right to be in receipt of certain benefits at certain times is contingent with all covered persons (employees, children, and surviving spouse) on the occurrence of certain events, those persons are nonetheless covered, *i.e.*, vested with coverage, under the LHWCA at the time of injury, subject, of course, to any defenses the employer/carrier may have.

Rather than give a very narrow interpretation to § 33(g), as the Fifth Circuit did, Congress expanded the scope of the employer approval requirements of § 33(g)

by the 1984 amendments. Those amendments expressed a clear intent that § 33(g) apply, without exception, to all claimants or potential claimants who settle third party claims for less than the compensation to which they "would be entitled." The LHWCA has recognized in § 33(f) and (g) that the employer's subrogation and offset rights with respect to future compensation liabilities are as important as they are with respect to compensation liabilities already incurred.

Further, this Court in *Cowart* referred to the employer's status as a "real party in interest with respect to any settlement that *might* reduce but not extinguish the employer's liability." *Cowart*, 505 U.S. at 482 (emphasis added). *Cowart's* interpretation dovetails with the purpose for § 33(f) and (g), which exist to protect employers in the face of payments they must make to covered persons without regard to fault. 33 U.S.C. § 904(b) (1986). This, in the context of the natural interpretation which should be given to the structure and purpose of § 33(g)(1), lead inalterably to the conclusion that Ingalls was a real party in interest to the pre-death settlements of Mrs. Yates. She and her attorneys chose to consummate those settlements without the consent of Ingalls. Accordingly, the direct and unmistakable language of § 33(g)(1) protects Ingalls from any further liability and compels the reversal of the Fifth Circuit in this case.

II. THE DIRECTOR OF THE OFFICE OF WORKERS' COMPENSATION PROGRAMS DOES NOT HAVE STANDING TO RESPOND IN THE COURTS OF APPEALS IN OPPOSITION TO A PRIVATE PARTY WITH RESPECT TO A RULING IN WHICH HE HAS NO INTEREST.

Notwithstanding the lack of a financial stake in this matter, the fact that claimant is represented by able counsel, and the fact that no administrative duties or functions of the Director will be affected by the outcome of this case, the Director has interjected himself into this appeal in active opposition to Ingalls. This is a workers' compensation claim which involves "private rights" under the LHWCA. *Kalaris v. Donovan*, 697 F.2d 376, 389-397 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983); *see Crowell v. Benson*, 285 U.S. 22 (1832). As such, for the Director to actively oppose an employer in a case which does not affect his administrative duties is contrary to the entire framework of the LHWCA.

Congress authorized the Secretary of Labor ("the Secretary") to administer the LHWCA and to promulgate the regulations necessary to carry out that delegation of authority, in much the same way any agency is empowered to administer the programs entrusted to it. *See* 33 U.S.C. § 939(a) (1986). The Secretary of Labor has, in turn, delegated his administrative duties under the LHWCA to the Director, Office of Workers' Compensation Programs. 20 C.F.R. § 701.201-.203 (1989). The Director's duties under the LHWCA are primarily ministerial. For example, the general responsibilities of the Director under the LHWCA are as follows:

> (1) supervising, administering, and making rules and regulations for calculation of benefits and processing of claims, 33 U.S.C. §§ 906, 908-10, 914, 919, 930, and 939 (2) supervising, administering, and making rules and regulations for provision of medical care to covered workers, § 907; (3) assisting claimants with processing claims and receiving medical and vocational rehabilitation, § 939(c); and (4) enforcing compensation orders and administering payments to and disbursements from the special fund established by the Act for the payment of certain benefits, §§ 921(d) and 944.

Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 115 S. Ct. 1278, 1285 (1995).

One of the specific functions of the Director is to encourage the informal resolution of conflicts between employers and employees. 20 C.F.R. § 702.311 (1989). The Director is also charged with providing "information and assistance" to all persons covered by the LHWCA, including employers. 33 U.S.C. §§ 902(1), 939(c) (1986). As such, this Court in *Newport News* pointed out that "[t]he Director is not the designated champion of employees within this statutory scheme. To the contrary, one of her principal roles is to serve as the broker of informal settlements between employers and employees." *Newport News*, 115 S.Ct. at 1286.

Where the parties cannot informally resolve their differences, the case must be referred to an independent "hearing examiner," upon the request of either party.[8] 33 U.S.C. § 919(d) (1986); *Ingalls Shipbuilding, Inc. v.*

[8] The hearing examiners are known as administrative law judges. 29 C.F.R. § 18.2(b).

Asbestos Health Claimants, 17 F.3d 130 (5th Cir. 1994); 20 C.F.R. § 702.301 (1989). The administrative law judge conducts the hearing and decides the case in accordance with the Administrative Procedures Act, 5 U.S.C. § 554 *et seq.* (33 U.S.C. § 919(d) (1986); 20 C.F.R. § 702.332 (1989)). A regulation enacted by the Director, not the statute, gives him the right to appear and participate before the administrative law judge. 20 C.F.R. § 702.333(b) (1989).

Following the hearing, the administrative law judge must enter an order making an award or rejecting the claim. 33 U.S.C. § 919(c) (1986). Thereafter, any "party in interest" has a right to appeal the decision to the Benefits Review Board. 33 U.S.C. § 921(b)(3) (1986); 20 C.F.R. §§ 702.391, 801.102 (1989). Again, a regulation of the Director, not the statute, allows him to appeal a case to the Benefits Review Board. 20 C.F.R. § 801.2(10) (1989). The Benefits Review Board is another administrative entity whose members are appointed by the Secretary of Labor. 33 U.S.C. § 921(b)(1) (1986).[9] The Board is organizationally located within the office of a Deputy Secretary of Labor (20 C.F.R. § 801.103 (1989)), and its members serve at the pleasure of the Secretary of Labor. 20 C.F.R. § 801.201 (1989). The Secretary may even remove a board member without cause. *Kalaris*, 697 F.2d at 381.

A decision of the Benefits Review Board may be appealed to a U.S. Court of Appeals for the appropriate

[9] The Benefits Review Board, acting as a "quasi-judicial" internal review mechanism, considers the record developed before the ALJs, administers department policy and renders decisions. 33 U.S.C. § 921(b)(3) (1986); *see* 20 C.F.R. § 802.301 (1989).

circuit. 33 U.S.C. § 921(c) (1986). The statute reads as follows:

> Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside.

33 U.S.C. § 921(c) (1986).

Only a "*person* adversely affected or aggrieved" by the decision may appeal a case to the court of appeals. *Id.* (emphasis added). The statutory term "person" is specifically limited in the LHWCA to an "individual, partnership, corporation, or association." 33 U.S.C. § 902(1) (1986). The statutory term "person" excludes the Secretary and the Director from becoming persons "adversely affected or aggrieved" for purposes of § 21(c) appellate review. The LHWCA does not by its terms make the Secretary or the Director a party to the proceedings or grant either one the authority to prosecute appeals to the courts of appeals.[10]

In *Newport News*, this Court held that where the decision of a court of appeals does not frustrate the administrative duties or functions of the Director, the Director is not "adversely affected or aggrieved" and therefore has no standing to appeal to the courts of appeals. *Newport News*, 115 S. Ct. at 1286-1287.

[10] However, by another regulation, the Director seems to give himself that authority. 20 C.F.R. § 802.410(b) (1989).

The Director's only position and reason for appearing as a respondent in this case is that he does not agree with Ingalls. In *Newport News*, this Court found that, even construing the LHWCA "as liberally as can be," the Director was not "adversely affected or aggrieved" within the meaning of § 921(c) in a case such as this. *Id.* at 1288. For all practical purposes, whether the Director has standing to appeal or whether the Director has standing to actively interject himself into an appeal to the courts of appeals is not a distinction of importance because there is no statutory authority for him to do either one.

In *Newport News*, this Court also held that the structure of the LHWCA itself suggests that the Director's role is supposed to be "facilitative – a service to both parties rather than an imposition on either of them." *Id.* at 1287. Thus, this statutory structure is obviously why the LHWCA does not empower the Director to participate in the courts of appeals on behalf of either party in a case involving private compensation rights.

The Fourth Circuit has consistently held that where the Director is not "adversely affected or aggrieved," he does not have automatic standing to participate either as an appellant or as a respondent in a case before it. *Parker v. Director, OWCP*, 75 F.3d 929, 935 (4th Cir. 1996); *I.T.O. Corp. v. Pettus*, 73 F.3d 523, 526 n.1 (4th Cir. 1996); *I.T.O. Corp. v. Benefits Review Board*, 542 F.2d 903, 909 (4th Cir. 1976) (en banc), *vacated sub nom., Adkins v. I.T.O. Corp.*, 433 U.S. 904 (1977), *reaff'd, I.T.O. Corp. v. Benefits Review Board*, 563 F.2d 646 (4th Cir. 1977) (en banc).[11]

[11] In *I.T.O. Corp. v. Benefits Review Board*, the Fourth Circuit held that "to be a party [respondent] before this court, the

Notwithstanding the fact that the Director was not adversely affected or aggrieved by the decision of the Benefits Review Board in this case, the Director asserted entitlement to automatic standing as a respondent before the Fifth Circuit. Ingalls objected to the involvement of the Director and its objection was carried with the case. The Director actively opposed Ingalls in the Fifth Circuit.[12]

In its ruling on the merits, the Fifth Circuit found a different ground for granting standing to the Director. Citing *Ingalls Shipbuilding, Inc. v. White*, 681 F.2d 275 (5th Cir. 1982), *rev'd on other grounds, Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 406-407 (5th Cir.) (en banc), *cert denied*, 469 U.S. 818 (1984), the Fifth Circuit held that the Director had standing to actively oppose Ingalls' appeal based upon Rule 15(a) of the Federal Rules of Appellate Procedure. Rule 15(a) states in pertinent part as follows:

> The petition must name each party seeking review . . . [and] also must designate the respondent and the order or part thereof to be reviewed. In each case the agency must be named respondent.[13]

Fed. R. App. P. 15(a)

Director must have some concrete stake in the outcome of the case." 542 F.2d at 907; (*see* Pet. Writ Cert. App. at pp. 181-197).

[12] Counsel for the Solicitor submitted briefs and participated in oral argument against Ingalls in the Fifth Circuit.

[13] Rule 15(a) defines the term "agency" as including agency, board, commission, or officer. Fed. R. App. P. 15(a).

In relying upon Rule 15(a), the Fifth Circuit in *White*, noted as follows:

> Rule 15(a) is generally applicable to statutory review proceedings within this Court's original jurisdiction. This Court has such jurisdiction under § 921(c). Prior to 1972, § 921(c) identified the "deputy commissioner making the order" as a respondent. The amended version of § 921(c) is silent as to who shall appear as a respondent for the agency, but the Secretary has filled that gap by promulgating 20 CFR § 802.410(b), which names the Director to represent the Department of Labor in review proceedings. Thus, it appears that the rule requires Ingalls to name the Director as respondent in its petition.

White, 681 F.2d at 282-283.

The general applicability of Rule 15(a) simply is not appropriate in the context of an LHWCA case because the Director's presence as a party is not necessary. In explaining why the Director should not be a respondent under Rule 15(a), the District of Columbia Circuit noted as follows:

> Normally, a single private party is contesting the action of an agency, which agency must appear and defend on the merits to insure the proper adversarial clash requisite to a "case or controversy." But Rule 1(b), Fed.R.App.P., says that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law." Here, there is sufficient adversity between [the employer and the claimant] to insure proper litigation without participation by the Board. To require the Board to appear as a party would parallel requiring the

> District Court to appear and defend its decision upon direct appeal.

McCord v. Benefits Review Board, 514 F.2d 198, 200 (D.C. Cir. 1975).

The ruling in *McCord* was expanded in *Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479 (D.C. Cir. 1982), to apply to the Director, OWCP. Specifically, the D.C. Circuit noted in *Shahady* as follows:

> The Director argues that if the Board is not a proper federal respondent, then the DOWCP must be. We disagree. The reasoning of *McCord* – that the rationale of Rule 15(a) is inapplicable to this kind of situation – applies as much to the DOWCP as it does to the Board.

Shahady, 673 F.2d at 485.

The rationale of the D.C. Circuit that Rule 15(a) is not applicable in the context of an LHWCA petition for review has also recently been adopted by the Fourth Circuit in *Parker v. Director, OWCP*, 75 F.3d 929 (4th Cir. 1996). In *Parker*, the Fourth Circuit held that the Director may not automatically be named as a respondent in the appeal of an LHWCA case without a showing that he is adversely affected or aggrieved within the meaning of § 21(c). *Parker*, 75 F.3d at 935.

Before the 1972 amendments to the LHWCA, Pub. L. No. 92-576, 86 Stat. 1251, deputy commissioners designated by the Secretary of Labor not only administered the claims but they also decided them. In order to appeal the decision of the deputy commissioner, the employee or employer was required to seek an injunction in the appropriate United States District Court against the deputy

commissioner. 33 U.S.C. § 921(b) (1927), *amended by* 33 U.S.C. § 921(b) (1986). Since the deputy commissioner was the defendant in the federal action, former § 21(a) of the LHWCA necessarily required that the deputy commissioner be named a respondent. *See* 33 U.S.C. § 921(a) (1928), *amended by* 33 U.S.C. § 921(a) (1986). In considering the 1972 amendments, fault was found with this scheme in which the deputy commissioners were both administrators and adjudicators. Thus, the amendments separated the two functions and provided that the designee of the Secretary of Labor (the Director) would be responsible for the administrative or clerical functions and the administrative law judges and the Benefits Review Board would be responsible for the adjudicative functions. The Senate Report to the 1972 Amendments complained that the old version of the LHWCA had:

> [s]uffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings. . . .

H.R. Rep. No. 1125, 92nd Congress, 2d Sess. 13-14 (1972).

Thus, even though the pre-1972 LHWCA necessarily required that the representative of the Secretary be designated as a defendant or respondent, the very purpose of the 1972 Amendments was to remove the Director from the adjudicative process. Accordingly, the present silence of the LHWCA as to any role of the Director before the courts of appeals must have been intentional and he should have no right to interject himself into compensation claims involving private rights. This is because the Director, as the administrator of claims, should be neutral. Nowhere in the LHWCA is the Director permitted to take sides.

In *Newport News*, this Court specifically addressed the silence of the post-1972 Amendments with respect to the standing of the Director to participate in appeals involving private compensation rights. In holding that this silence is intentional, this Court noted as follows when comparing the LHWCA to the Black Lung Act[14]:

> The Director argues that since the Secretary is explicitly made a party under the BLBA, she must be meant to be a party under the LHWCA as well. That is not a form of reasoning we are familiar with. The normal conclusion one would derive from putting these statutes side by side is this: when, in a legislative scheme of this sort, Congress wants the Secretary to have standing, it says so.

Newport News, 115 S. Ct. at 1288.

Rule 1(b) of the Federal Rules of Appellate Procedure states that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the court of appeals as established by law." Since the LHWCA does not extend to the Director the authority to participate in appeals in which he is not adversely affected or aggrieved, Rule 1(b) precludes his active participation in this case.

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[14] The Black Lung Act includes specific statutory standing for the Director before the courts of appeals. The LHWCA does not.

CONCLUSION

Under 33 U.S.C. § 933(g)(1), Ingalls has the inviolate right, the same as all LHWCA employers, to approve third party settlements by a worker or those claiming through him which are for less than the compensation to which they would be entitled. As such, the rights of Ingalls which § 33(g)(1) was meant to protect were violated when Mrs. Yates entered into third party settlements during the lifetime of her husband for less than the compensation to which she would be entitled due to his work-related injury and death. Under these circumstances, the direct and unmistakable language of § 33(g)(1) requires, without exception, that Ingalls should have no further liability to Mrs. Yates in this case. Accordingly, the Fifth Circuit ruling should be reversed.

The Fifth Circuit's ruling allowing standing to the Director as a respondent should also be reversed. The LHWCA gives the Director no standing, either as an appellant or as a respondent, to actively participate in a workers' compensation claim involving private rights between an employee and his employer. The statutory term "person" excludes the Secretary of Labor and the Director from becoming persons "adversely affected or aggrieved" for purposes of § 21(c) review of such cases by the courts of appeals. 33 U.S.C. §§ 902(1), 921(c) (1986). Accordingly, the courts of appeals are precluded by Rule 1(b) of the Federal Rules of Appellate Procedure from extending their jurisdiction to permit active participation by the Director because he has not been given that right

by the LHWCA itself. Therefore, the contrary ruling of the Fifth Circuit should be reversed.

Respectfully submitted,

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